This view of the law was adopted by this court in *Osman and another* v. *Public Prosecutor*.[2] The trial judges having found that the cautioned statement was made voluntarily and that the appellant's admission therein that he hit the deceased on the head while the deceased was asleep was true, they were entitled to act on it.

The next submission was that the appellant's defence was inadequately considered by the trial judges. It was contended that as the evidence against the appellant was entirely circumstantial and as the prosecution had failed to call evidence in rebuttal of the appellant's *alibi*, the trial judges, even if they disbelieved the appellant's evidence, should have gone further and considered whether it was probable that he was somewhere else when the deceased was attacked and killed.

The appellant's evidence was that on the night in question, at the time the deceased was attacked, he was asleep in the room of his girl friend named Azizah, at 44 Sam Leong Road, Singapore. The appellant did not call Azizah nor any other occupant of that house. He claimed that Azizah had removed from that address and could not be found. The appellant's *alibi* was therefore based entirely on his own evidence. As the trial judges disbelieved his evidence that at the time of the attack on the deceased he was asleep at 44 Sam Leong Road, his *alibi* was rightly rejected. Furthermore, it is not correct that the evidence against the appellant was entirely circumstantial. In his cautioned statement to the police, the appellant had admitted attacking the deceased with a piece of wood. This was direct evidence from the appellant's own mouth which the trial judges believed to be true and it was sufficient to support his conviction.

The next submission was that the trial judges failed to give adequate consideration to the fact that the appellant was drunk at the time he attacked the deceased; that accordingly he was incapable of forming the intention to kill and that he should therefore have been convicted of the lesser offence of culpable homicide not amounting to murder.

There were only two references to liquor in the whole case. First, there was the evidence of the appellant that on the night in question at about 11 p.m. at Jalan Sultan he joined one Isa and one Thamby and two girls who were eating and drinking liquor. He ordered some food and an empty glass and someone poured beer into his empty glass. He did not say that he consumed the beer and if so how much beer he consumed. The other reference was in his cautioned statement to the police when he stated: "On 1st February 1973 at about 2 a.m. I was walking along Syed Alwi Road Market. I was drunk." He did not disclose what he drank, the quantity he drank or the state of his intoxication. The trial judges dealt with this question in their judgment as follows:

"We had also considered the question of drunkenness. The only evidence that the accused consumed liquor came from the accused himself that he had some beer at Jalan Sultan on the night of the 31st January 1973. In his cautioned statement he said that he was drunk on the 1st February 1973, at about 2 a.m. In the circumstances of this case we were of the opinion that the accused could not rely on the defence of intoxication as provided by section 85 of the Penal Code."

We agree with the trial judges that the evidence before them was insufficient to support the defence of intoxication laid down in section 85 of the Penal Code. In our judgment the bare statement of the appellant that he was drunk was inadequate to negative the intention to kill and this ground of appeal also failed.

Lastly, it was submitted that the appellant had no intention to kill the deceased; that had he wanted to kill, he would have used some deadly weapon such as a knife; that the fact that only a piece of wood was used negatived the intention to kill and that the appellant should therefore have been convicted of causing grievous hurt or at the highest of culpable homicide not amounting to murder.

The serious injuries suffered by the deceased, all on the head, as a result of several blows, resulting in three distinct fractures of the skull, which caused death within a matter of minutes, was ample evidence of intention to kill. In our opinion this ground of appeal was entirely without merit.

In our judgment, there was ample evidence before the trial judges which proved beyond a reasonable doubt that the appellant had caused the death of the deceased in circumstances which amounted to murder under section 300 of the Penal Code and we therefore dismissed his appeal.

Appeal dismissed.

Solicitors: *Murugason & Co.*

VAYNAR SUPPIAH & SONS v. K.M.A. ABDUL RAHIM & ANOR.; OWNERS OF "LEXA MAERSK" & ORS. v. K.M.A. ABDUL RAHIM & ANOR.

[C.A. (Wee Chong Jin C.J., Chua and Winslow JJ.) May 28, 1974]

[Singapore — Civil Appeals Nos. 9 and 11 of 1973]

Carriage of Goods by Sea — Contract — Carriers — Bill of Lading — Damage to goods — Reports by surveyors — Maker of report not called — Admissibility — Evidence Act (Cap. 5), s. 32.

The plaintiffs were the holders of clean bills of lading in respect of goods shipped from Karachi to Singapore on board two ships owned by the first defendants. The second defendants were lighterers who, as independent contractors, conveyed both sets of cargo from ship to shore by means of lighters. The plaintiffs successfully contended in the High Court ([1973] 2 M.L.J. 121) that the goods on board one ship, the "Lars" cargo, were damaged by sea water during the ocean voyage, and that consequently the first defendants were liable for that damage. The first defendants were also held liable in respect of damage to the goods which had been carried on board the other ship, the "Jens" cargo, since, while the damage occurred through rain during the lighterage phase, the goods had not yet been "discharged" and the first defendants continued to be responsible for the goods under the Hague Rules. The second defendants were found liable to the plaintiffs in respect of damage to the "Jens" cargo and were also held liable to indemnify the first defendants in respect of all monies which the first defendants would have to pay the plaintiffs in consequence of that damage. In reaching its decision on the "Lars" cargo, the court relied almost completely on the Herring report of a firm of professional cargo surveyors, despite the objections raised by both defendants as to its admissibility, and neither the surveyor who undertook the survey nor the survey clerk (who were the only persons in the firm to have examined the goods in

question) was called as a witness. As regards the "Jens" cargo, in order to establish the nature, extent or cause of damage to the goods, the court relied on a report made by a survey clerk, who was not called to give evidence, and signed by F. Jones, who knew nothing about the external or internal condition of the goods. Reliance was also placed on the Anglo American survey report. On appeal by both defendants,

Held: (1) as regards the "Lars" cargo, since there was no evidence before the court of damage to the goods apart from the Herring report, and since the Herring report was inadmissible as not satisfying the requirements of section 32 of the Evidence Act, it was not proved that the goods delivered were not in the same apparent good order and condition as when shipped;

(2) as regards the "Jens" cargo, the survey clerk's report was inadmissible for the same reasons, and there was no evidence, even on the basis of the Anglo-American survey report, of the nature, extent, or cause of the damage to the goods;

(3) both appeals must therefore be allowed.

Per curiam: where the carrier issues clean bills of lading, he is estopped as against innocent indorsees thereof from alleging or showing that there was external damage or staining of the goods on shipment, but he is not so estopped in respect of matters pertaining to the internal condition of the goods inside the cases when shipped.

Cases referred to:-

(1) *Silver* v. *Ocean S.S. Co.* [1930] 1 K.B. 416.

(2) *Canadian and Dominion Sugar Company Ltd.* v. *Canadian National (West Indies) Steamships, Ltd.* [1947] A.C. 54.

(3) *The Ida* 32 L.T. 541.

COURT OF APPEAL.

K. E. Hilborne for the appellants in Civil Appeal No. 9 of 1973 and second respondent in Civil Appeal No. 11 of 1973.

K. A. O'Connor for the appellants in Civil Appeal No. 11 of 1973 and second respondent in Civil Appeal No. 9 of 1973.

M. Karthigesu for the first respondent in Civil Appeal Nos. 9 and 11 of 1973.

Winslow J. (delivering judgment of the Court): These two appeals against the judgment of the High Court in a consolidated action involving three Admiralty Suits Nos. 109/68, 1961/68 and 2479/68 instituted by the plaintiffs/first respondents against the present appellants as defendants therein were heard together and it may be convenient to deal with them both in one judgment.

At the end of the trial of that action, the trial judge delivered oral judgment as follows, which was later incorporated in a formal judgment: —

"I hold on the evidence before me that the goods on the 'Lars Maersk' were damaged by sea water while on board the Lars Maersk and consequently the first defendants are liable for this damage and the second defendants are not liable for this damage. As regards the goods on the 'Jens Maersk' I hold that the goods were damaged by rain water during the lighterage phase in Singapore and the first defendants are liable to the plaintiffs for this damage and the second defendants must indemnify the first defendants in respect of all monies which the first defendants have to pay the plaintiffs in consequence of this damage.

The second defendants are also liable to the plaintiffs in respect of this damage.

I hold that the extent of the damage in both cases was 50% and not 65% as claimed by the plaintiffs.

Judgment for the plaintiffs against the first defendants in respect of the 'Lars Maersk' cargo for $56,298.80 together with interest at 8% per annum from 7th October 1968 to date and costs. Judgment for the plaintiffs against the first and second defendants in respect of the 'Jens Maersk' cargo for $26,845 and interest at 8% per annum from 7th October 1968 to date and costs.

The first defendants are entitled to recover from the second defendants all monies paid by them to the plaintiffs in respect of the damage to the 'Jens Maersk' cargo and costs.

The plaintiffs' claim against the second defendants in respect of the 'Lars Maersk' cargo is dismissed with costs."

Mr. O'Connor appeared on behalf of the appellants in respect of the *Lars Maersk* cargo in Civil Appeal No. 11/73. They are also the second respondents in Civil Appeal No. 9/73.

Mr. Hilborne appeared for the appellants in respect of the *Jens Maersk* cargo in Civil Appeal No. 9/73 who are also the second respondents in Civil Appeal No. 11/73.

Mr. Karthigesu represented the plaintiffs/first respondents in both appeals.

It may be convenient to refer to Mr. O'Connor's clients as "the Ocean Carriers" and Mr. Hilborne's clients as "the Lighterers" who conveyed the goods concerned from the Ocean Carriers' vessels, the *Lars Maersk* and the *Jens Maersk* respectively, in their own lighters to the P.S.A. godowns from their anchorage in the outer roads of the Eastern Anchorage at Singapore.

Mr. Karthigesu's clients were either owners of all the said goods under the 9 Bills of Lading specified in the claims or were indorsees thereof to whom property had passed thereunder or were at least persons entitled to take delivery of the said goods which they did from the P.S.A. godowns. 7 of these Bills of Lading were in respect of 404 cases of nylon piece goods carried by the *Lars Maersk* which arrived in the said outer roads on 29th November, 1967 whilst the other 2 Bills of Lading were in respect of 400 bales of bleached white cotton cambric and 9 cases of metallic fancy shirting carried on the *Jens Maersk* which arrived in the same outer roads on 24th December 1967.

There was no dispute that the Lighterers were employed by the Ocean Carriers in conveying both sets of cargo from ship to shore as aforesaid and it was conceded that they were independent contractors.

The Lighterers are only concerned in these appeals with the *Jens Maersk* cargo whereas the Ocean Carriers are concerned with both the *Lars Maersk* as well as the *Jens Maersk* cargoes as they owned both these ships at the material time.

Both shipments were from Karachi and, in both cases, the relative Bills of Lading were clean bills of lading stating that the goods concerned were shipped in apparent good order and condition.

In respect of the *Lars Maersk* cargo, it is strenuously contended on behalf of the Ocean Carriers that they should not have been held liable for breach of contract or duty and/or negligence in the ocean carriage from Karachi to Singapore of the 121 cases of nylon piece goods alleged to be damaged as claimed for a variety of reasons.

Mainly, it is contended that —

(1) the goods had not been shown to be undamaged when shipped;

(2) it had not been shown that damage by sea water took place whilst the goods were carried on board the *Lars Maersk;*

(3) the trial judge had acted on inadmissible evidence, particularly in admitting a survey report dated 20th January 1968 by Messrs. Herring & Co., a well known firm of cargo surveyors, because the maker thereof with personal knowledge was not called to give oral evidence; and,

(4) with regard to the award of damages, there was no evidence of the nature and extent of the actual damage and of the loss in fact suffered by the first respondents.

With regard to the first contention, we are of the view that because of the clean bills of lading issued herein, without any qualification whatsoever, the Ocean Carriers are estopped as against innocent indorsees or holders thereof from proving that the goods concerned were not "in apparent good order and condition" as stated in the bills when shipped at Karachi.

In *Silver* v. *Ocean S.S. Co.*[1] referred to as an authoritative decision by the Privy Council in *Canadian and Dominion Sugar Company, Ltd.* v. *Canadian National (West Indies) Steamships, Ltd.*[2] this principle is clearly laid down but the estoppel fails where the statement in the bill of lading is not sufficiently clear and unqualified. This is what the Privy Council held in the Canadian case.

That portion of *Scrutton* on Charter Parties (17th Edn.) at page 156 cited and relied upon by counsel for the Ocean Carriers to the effect that "if such goods are delivered damaged the shipper must give *prima facie* evidence that they were shipped in good condition internally or that the damage resulted from some cause for which the shipowner is liable" has no relevance to goods shipped under unqualified bills of lading *i.e.* clean bills and only refers by "such goods" to goods delivered under bills in which the statement as to apparent good order and condition is a qualified one. The case of *The Ida*[3] (which also went to the Privy Council) referred to in footnote (k) on the same page of *Scrutton* was such a case. Moreover it involved a claim by a shipper against a shipowner in 1875 and is no authority in favour of the proposition that estoppel does not avail an innocent indorsee or holder for value or person rightly taking delivery under a bill of lading against a shipowner who has issued a clean bill of lading.

As Lord Wright said in the Canadian case at page 55: —

"A question now of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities. On that basis the language of the bill of lading, read fairly, and as a whole, is not, for reasons which their Lordships have already here given, such as to found an estoppel. Their Lordships in so deciding are not in any way weakening the rule that a shipowner who issues a clean bill of lading is bound by the statement in it that the goods are shipped in good or in apparent good order and condition: if the statement turns out to be untrue the shipowner is estopped from alleging its falsity as against a purchaser who relies on the statement at its face value and acts on it to his detriment. This is a rule which may be applied any day in the case of c.i.f. contracts. To cast doubt on it would be to weaken the whole course of dealing between business men in regard to bills of lading in their character of documents of title used in connexion with overseas shipments of goods. It is true that the unqualified statement is only one step in the establishment of the estoppel. Estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted on, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as, indeed, it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. The purchaser or other transferee must have acted on it to his detriment, as, for instance, he did in this case when he took up the documents and paid for them. It is also true that he cannot be said to rely on the statement if he knew that it was false: he must reasonably believe it to be true and therefore act on it. Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified. That, in their Lordships' judgment, is the position in this case."

Nor is there, in our view, any burden on the part of such an indorsee, in the first instance, to call the shipper to testify as to the internal good condition on shipment of goods which are delivered damaged at their destination under clean bills.

As, in the *Lars Maersk* case, the Bills of Lading did not clause external damage or staining it seems clear that the Bills of Lading in question were clean bills of lading. If the indorsees as recipients of the goods could substantiate damage by sea water to the goods on delivery the burden shifted to the Ocean Carriers to show that the goods were damaged by sea water elsewhere subject to the estoppel as to apparent good order and condition on shipment. The trial judge was, on this aspect of the matter, perfectly right in holding that, if the case for the Ocean Carriers was that the goods were damaged by sea water before shipment it was for them to prove it, assuming that there was some evidence adduced by the plaintiffs that sea water damage occurred whilst the goods were on board the *Lars Maersk* during her voyage to Singapore.

As was held in the *Silver* case, where eggs packed in tins some of which were found gashed externally and some were found having pin-hole perforations which were not visible on reasonable inspection, the shipowners were estopped from denying that they were not gashed on shipment under clean bills but they were not estopped in respect of the pin-hole perforations which were not easily discernible on reasonable examination.

In these appeals, the Ocean Carriers were estopped from alleging or showing that there was external damage or staining at Karachi but they were not so estopped in respect of matters pertaining to the internal condition of the goods inside the cases when shipped.

On proof by the indorsees that these goods were received in a damaged condition from the *Lars Maersk* it was for the Ocean Carriers to show internal bad condition on shipment if they could.

Even in the case of *The Ida*, the proposition that a plaintiff-shipper was bound to prove first that the goods found subsequently damaged were shipped in

good order and condition or lose his claim altogether in the case of qualified bills of lading was rejected although it was stressed that on failure to do so the plaintiff would be bound "to give very clear and cogent evidence that the damage it sustained was traceable to causes for which the shipowner was responsible".

In the *Lars Maersk* case, the existence of clean Bills of Lading may not have necessitated such a high standard of proof of damage but it did not however absolve the indorsees thereof from having to show that damage by sea water occurred on the *Lars Maersk*, owing to the fault of the Ocean Carriers, at least by a preponderance of evidence.

That standard of proof, in our judgment, was unfortunately lacking in respect of the *Lars Maersk* cargo by virtue of the almost complete reliance by the plaintiffs/respondents on the Herring report which was admitted in evidence without argument after objection by both appellants in the absence of the maker of that report who was the only person apart from a survey clerk in that firm who had any personal knowledge of the goods in question and in fact examined them both at the godowns and at the plaintiffs' premises in High Street. The survey clerk was not called as a witness either.

It is unfortunate perhaps that on a matter of such crucial importance to the success or failure of the claim by the plaintiffs/respondents, there being no oral evidence of damage to the goods on their arrival in Singapore either when the said goods were first seen at the P.S.A. godowns or upon examination of the cases and their contents when the cases were opened up at the plaintiffs'/respondents' premises in High Street, the trial judge did not hear argument on the objections raised by both appellants to the admissibility of this report and explore the reasons for the non-attendance of the maker thereof.

This person was said to be in Australia then, but no explanation was given why he could not give evidence nor was any material placed before the court on which it could decide that his attendance could not be procured without an amount of delay or expense which under the circumstances of the case appeared to the court to be unreasonable within the meaning of the opening words of section 32 of the Evidence Act. There is nothing in the Notes of Evidence of any objection or argument in relation to the admissibility of this report and the only record that appears is in the judgment itself where the trial judge said: —

"It is true that J. C. Jones who made this survey was not called by the plaintiffs and counsel for the first defendants made much of this fact. He complained that he was deprived of the opportunity of cross-examining Jones. That is true. But the fact remains that Herring & Co's report was proved by the plaintiffs in accordance with the Evidence Act and it was admissible in evidence."

It should be noted that the application for the survey report by Herring & Co. was made by the insurers of the goods in question. A letter of subrogation was given later by the plaintiffs/respondents to the insurers after they had received payment of a sum equal to 50% of the invoice value of the goods which had been certified as damaged and were covered by the certificates of insurance concerned plus 10%.

It may be useful to set out the contents of the survey report relating to the examination of the cases themselves after it sets out the numbers and markings of 121 cases examined under the heading "Presented for Survey": —

"All the above cases were superficially examined whilst being collected by the Consignee from the Port of Singapore Authority Godown No. 19. The Carrier's Agents representative, Mr. Charlie, made a brief attendance but did not remain throughout the inspection. In view of the condition of the cases which were externally dry stained with some showing evidence of external damage, samples of their contents were drawn at random from cases and were submitted to a salinity test by precipitation which proved positive. Subsequently these samples were submitted for analysis to confirm cause of damage and the following is an extract from the analytical report.

ANALYSIS

PH	5.8	Sodium	Present
Chlorides	Present	Potassium	Present
Sulphates	Present	Magnesium	Present
Bromides	Present	Calcium	Present

Analysis of the above sample submitted showed the presence of the major elements of sea water in the correct proportions.

We were instructed to carry out a detailed examination of the contents of the cases. This inspection was effected at the Consignee's premises. Each case was opened in our presence and the contents verified against the Packing Lists. The damaged pieces were carefully examined and the Nylon Cloth was noted to be stained throughout to varying degrees. The affected pieces were found to be, generally speaking, adjacent to the dry stained planks. The middle sections of the cases were, in most instances, dry, as a consequence of which a number of pieces were accepted as being in good condition.

The Consignee did not attend the General Survey for the reason that apparently documents were not available.

We are of the opinion that, notwithstanding damage to the goods under report, greater care should have been taken to provide adequate protective interior packing. The cases were constructed of second-hand planks and whereas water resistant brown paper was supplied with the object of protecting the contents, this wrapping was not correctly positioned and such indiscriminate packing of a careless nature assisted absorption of water. We recommend that this matter be brought to the attention of the suppliers.

Damage Summary

	No. of cases affected	*No. of pieces affected*	*Yardage affected as calculated from Packing List*
B/L No. 12	21	384	14,162
B/L No. 38	32	1,189	27,473
B/L No. 39	20	453	10,640
B/L No. 36	15	423	11,700
B/L No. 40	17	761	18,325
B/L No. 37	4	153	3,760
B/L No. 35	12	345	7,688
Total	121	3,708	93,748

Cause of Damage & Loss

In view of the analytical report there is no doubt but that the material has been subjected to contact with sea-water, most probably during transit.

Loss

The Consignee requests 65% loss based on the insured value but subject to the terms and conditions of Insurance we are of the opinion that there is a 50% loss in sales value which should also cover the cost of reconditioning of the material.

Sgd. Herring & Co."

It may be relevant at this stage to observe that none of the witnesses called on behalf of the plaintiffs/respondents did himself ever make any physical examination of the goods in question either at the

godowns of the P.S.A. or at the premises of the plaintiffs in High Street. The transport contractor who first complained to the plaintiffs of damage to these cases when he saw them at the godowns was not called as a witness nor was anyone else from the plaintiffs' firm itself called to give any evidence of his own inspection of the goods when the cases were opened up and examined by the surveyor and the survey clerk from Herring & Co. The survey clerk himself was never called as a witness. All that appears from the evidence is that he had left the firm of Herring & Co.

There was only one witness, the consultant chemist, Dr. Rintoul, who examined a plastic bag containing dry pieces of material, as one sample, for the presence of salt water ingredients as found and set out in the Herring Report. He could not recall seeing any stains on the pieces of material which were sent to him in that bag by Herring & Co. He was not in a position to say when salt water contamination could have occurred. This witness had no personal knowledge of where the pieces he examined came from. They were samples contained in a plastic bag labelled "Material, *Lars Maersk*". From his work sheet he was able to assure the court that there were no apparent stains on any of the samples he saw. He did not even know that Herring & Co. were dealing with 121 cases. He even said that he was not requested to ascertain when the samples could have been contaminated by sea water. He said the samples he saw were dry to the touch and "they could have been dry for a thousand years or it could have been recent". He said that the samples he saw had been destroyed. These were pieces 4" x 2" sent to him for analysis. He said the balance would be the responsibility of Herring & Co. It would accordingly appear that there was not one single piece of material either from the samples sent for analysis or from the unanalysed samples kept by Herring & Co. or of the actual pieces certified as damaged by Herring & Co. which were ever before the court. One is therefore left only with the evidence which now appears on the record.

We would now revert to the important question namely, the admissibility of the Herring report, the contents of which have already been set out.

Mr. Karthigesu for the plaintiffs/respondents contended that this report was admissible under section 32(b) of the Evidence Act.

Section 32(b) reads as follows: —

"When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;"

Mr. Karthigesu contended that it was not convenient always to call a person having personal knowledge of the facts in question so long as the entry is shown to have been made in the ordinary course of business and consists of any entry or memorandum made by such a person in books kept in the ordinary course of business or in the discharge of professional duty. That may well be so in the case where the identity of that person is unknown.

The question however arises whether this report, signed by someone who did not prepare the report himself as a result of personal examination of the goods in question, consists of an entry or memorandum made in books kept in the ordinary course of business or in the discharge of Mr. J. C. Jones's professional duty. On the evidence it would appear that the field survey books from which this report was compiled have been disposed of and do not exist. It therefore seems to us that this report is far from complying with even the preliminary requirements for its admissibility in view of the fact that this report was certainly not an entry or memorandum made in a book kept by Mr. J. C. Jones either in the ordinary course of business or in the discharge of his professional duty.

Quite apart from the fact that Mr. J. C. Jones's non-attendance at the trial does not seem to have been investigated with a view to the court's being satisfied that his attendance could not be procured without an amount of expense and delay which to the court appeared unreasonable, it also seems to us that this report is not the kind of entry or memorandum in a book kept in the discharge of professional duty which section 32(b) contemplates. It certainly contains expressions of opinion within the meaning of section 45 of the Evidence Act which could not have been intended by section 32(b) to be included. Further, the circumstances surrounding the investigation into the cause of any damage by sea water of the goods concerned inside these cases of nylon piece goods, in our opinion, necessitated the presence of the maker of the report for cross-examination in order to satisfy the court that such damage occurred after shipment.

Without this report, there was no evidence that sea water damage to the goods themselves as claimed took place on board the *Lars Maersk*. In fact, the Ocean Carriers called witnesses to state that there were no stains on the cases when delivered either into the lighters or at the godowns on arrival.

Although the trial judge dismissed such witnesses as valueless because of their perfunctory examination of these cases, the fact remains that, after having referred to the Herring report as providing incontrovertible evidence of damage to the goods by sea water most probably during transit, the final conclusion on the evidence as a whole was that, in view of the conclusive nature of this report, it was more probable than not that such damage took place on the *Lars Maersk*.

As we have rejected the Herring report as inadmissible, the claim against the appellants in respect of the *Lars Maersk* cargo must, in our judgment, necessarily fail because there was no other evidence that the goods delivered were not in the same apparent good order and condition as when shipped at Karachi.

We now turn to the plaintiffs/respondents' claim in respect of the *Jens* cargo.

Here again, no one with personal knowledge on inspection of the goods inside the bales and cases was called as a witness. No Loss Assessment Survey at the premises of the plaintiffs/respondents ever took place. The survey clerk, one Shammugan, who performed the General Condition Survey at the P.S.A. godowns was never called to give evidence. The report which he made was signed by Mr. F. Jones of

Herring & Co. who himself knew nothing of the external condition of the bales and cases or the internal condition of the goods concerned. No one in the firm of the plaintiffs who actually saw the goods on the opening up of the bales and cases gave evidence. According to Capt. Rivers of Herring & Co. who himself never saw the goods at all, the General Condition Survey "does not attempt to establish the details, extent of damage nor the cause of damage. No liability is involved at this stage". It only intends "to establish in general terms the amount of contents which may have been damaged".

With regard to this particular General Survey at C210 he said that only the external appearance of the cases was examined!

The Certificate of General Condition at C210 so far as relates to the plaintiffs' cargo on the *Jens Maersk* reads: —

"On the 17th, 18th and 19th days of January 1968, at the request of The British India General Insurance Co. Ltd., Bank of China Building, Battery Road, Singapore, we did attend at the Port of Singapore Authority Godowns Nos. 20A/D and R, for the purpose of conducting a general condition survey on consignments of Textiles which had been discharged ex s.s. 'JENS MAERSK', which vessel arrived in Singapore on the 24th day of December, 1967.

In Attendance: Mr. Ali representing Messrs. V.M.S. Abdul Razak

Consignment: 400 Bales Bleached White Cotton Cambric

D/O. No. 51551		— 335 bales delivered during our attendance said to be in apparent good condition.
A.R.C. S'PORE 401/800	— Bleached White Cotton Cambric	— 65 bales covers dry stained, opened and examined and each piece found slightly dry stained at edges.
V.M.S. R R. M 15244 S'PORE	— Metallic Fancy Shirting	— 1-case dry stained and iron band rusty, opened and examined and found to contain:
No. 3		27 pieces stained badly 11 pieces stained slightly 22 pieces in apparent good condition.
– „ – – „ – No. 9	– do –	— 1 case – do – 62 pieces stained slightly.
– „ – – „ – – „ – No. 1	– do –	— 1 case – do – 43 pieces stained badly 17 pieces stained slightly.
– „ – – „ – – „ – No. 2	– do –	— 1 case dry stained, opened and examined and found to contain 42 pieces in apparent good condition.
– „ – – „ – No. 4	– do –	— 1 case – do – 63 pieces stained badly 3 pieces stained slightly."

It would appear that, far from establishing the nature, extent or cause of damage to the goods in question, the report by Shammugan signed by Mr. F. Jones was also inadmissible for the same reasons as we have given in relation to the report of Mr. J. C. Jones signed by Mr. F. Jones on the *Lars Maersk* cargo.

There was accordingly, even on the basis of the Anglo-American survey report at C170 showing that 65 bales of bleached white cotton cambric covers were dry-stained and the contents slightly dry-stained at the edges of every piece, on which the plaintiffs also relied, no evidence of the nature, extent or cause of the damage to the *Jens* cargo on which the trial judge could reasonably conclude what damage if any was caused to the goods concerned during their carriage by the Lighterers from ship to shore in Singapore. Furthermore there was no Loss Assessment Survey as in the case of the *Lars Maersk* cargo. No one gave evidence of what had happened to the goods alleged to be damaged or at what price they had or could have been sold after arrival. There was accordingly no material on which the trial judge could conclude that it was fair and reasonable to allow the plaintiffs 50% in respect of the *Jens Maersk* cargo because they had claimed 65% damage in respect of the *Lars Maersk* cargo and been allowed 50% instead by Herring & Co. in their report. That report, we have found to have been wrongly admitted. Moreover, there was no evidence on which the principle of "*restitutio in integrum*" in assessing damages could be applied, *viz.*, that the claimant must be put back into the same position he was in before the damage was done. In cargo claims, this usually means the difference between "the sound market value of the goods at destination and their damaged value at that point" (see *Tetley* on Marine Cargo Claims, 1st Edition at page 79).

In our judgment, the appeals must therefore both be allowed.

Appeals allowed.

Solicitors: *Hilborne & Co.; Allen & Gledhill; Drew & Napier.*

TAN KIONG HWA v. ANDREW S.H. CHANG

[O.C.J. (Winslow J.) August 23, 1974]
[Singapore — Suit No. 2737 of 1972]

Agency — Secret profit — Duty to disclose — Agent director of company — Liability of agent.

In this case the plaintiff claimed the sum of $9,000 being a secret profit made by the Malaya Union Co. (Pte.) Ltd., of which the defendant was then the managing director as a result of a transaction in which the plaintiff claimed the defendant was his personal agent to sell a flat. The plaintiff had originally bought a flat from the company but before the sale was complete, he authorised the defendant in his personal capacity to sell the flat for $45,000. It appeared that the flat was sold for $54,000 and the sum of $9.000 was credited as "increment of selling price" to the company. The company subsequently went into liquidation.

Held: the plaintiff was entitled to the sum of $9,000 as the defendant was in a fiduciary position as agent and it was a breach of his fiduciary duty to the defendant for the plaintiff to do otherwise than to pay the $9,000 to his principal, the plaintiff.

Cases referred to:-

(1) *Bray* v. *Ford* [1896] A.C. 51.
(2) *Regal* v. *Gulliver* [1942] 1 All E.R. 392.
(3) *Boulting* v. *Association of Cinematograph, Television & Allied Technicians* [1963] Q.B. 137.